Supreme Court, U.S.
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No. 00-1294

IN THE

Supreme Court of the United States

STEPHANIE BEKKER,

Petitioner,

v.

HUMANA HEALTH PLAN, INCORPORATED,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

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STATEMENT PURSUANT TO RULE 29.6

Respondent, Humana Health Plan, Incorporated, is a wholly owned subsidiary of Humana, Inc. No publicly held company owns 10% or more of the stock of Humana, Inc.

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STATEMENT OF THE CASE

A. Statement of facts

Bekker is a licensed medical doctor. She was employed by Humana Health Plan, Incorporated, a health maintenance organization, as an internist in its Lincoln Park Center. She worked weekdays and every other Saturday. On occasion, Bekker was the only physician present at the Center. She also had on-call responsibilities, which required her to work twenty-four hour shifts three to five times per month (Pet. App. 2a, 22a).

In 1990, a nurse informed Dr. Thomas, the Clinical Director for the Center, about a rumor that Bekker smelled of alcohol. Thomas discussed the rumor with Bekker, and they concluded that the odor may have been caused by Bekker's mouthwash (Pet. App. 2a).

In 1995, a patient complained that she had smelled alcohol on Bekker during her appointment. At Humana's request, Bekker had an independent medical evaluation by Dr. Paul Feldman at Rush Presbyterian-St. Luke's Medical Center. Feldman is a specialist in alcohol and substance abuse, particularly with respect to physicians (Pet. App. 3a).

Feldman did not diagnose alcohol abuse or dependence but found that "there are indicators suggestive of problematic alcohol usage," including a report from a physician who worked with Bekker that he had smelled alcohol on her breath on three or four occasions in the past five years, two of which had occurred in the past four months. Feldman recommended that for a year Bekker remain abstinent from alcohol and have monthly random urine testing, to which Bekker agreed.

Bekker was tested thirteen times, and all her tests were negative. After the testing period ended, Bekker resumed drinking (Pet. App. 3a).

In November 1996, another patient complained that Bekker smelled of alcohol during her appointment. Diane Dusek, Humana's Director of Risk Management and Employee Health Services, was advised of the complaint and began an investigation. Dusek spoke with the patient, who was a substance abuse counselor; the patient confirmed that Bekker had smelled of alcohol during her November 1996 visit and added that she may have also smelled alcohol during an earlier appointment as well (Pet. App. 3a-4a).

On November 26, 1996, Dusek telephoned Bekker, who had been suspended with pay pending the results of the investigation, for her account of the situation. Bekker denied using alcohol before or during scheduled work hours or when on-call. The next day Bekker called Dusek and offered three possible reasons for her smelling of alcohol: her Bonnie Bell face wash, her air freshener and her recycling of beer bottles which she claimed to have found while walking her dog in the morning near Wrigley Field (Pet. App. 3a-4a).

Dusek also spoke with staff members who worked with Bekker at the Lincoln Park Center. A medical assistant reported that she had smelled alcohol on Bekker at least once a week, that Bekker had glassy eyes when the odor was present and that patients and other employees had commented about the odor. A nurse told Dusek that she had smelled alcohol on Bekker two to three times a week during the period of time she worked with Bekker and that patients had made comments to her about Bekker or Bekker's examination room smelling of alcohol. Another employee told Dusek that she

smelled alcohol on Bekker on at least a weekly basis, that when the odor was present Bekker's face appeared flushed and her eyes dilated and that a patient had made a comment about Bekker drinking. Two triage nurses also confirmed that they had smelled alcohol on Bekker and that other employees also talked about it. Center Manager Thomas told Dusek that approximately a week and a half before she had smelled an unusual odor on Bekker while at work and thought it might have been alcohol (Pet. App. 4a, 26a).

After being apprised of the results of Dusek's investigation, Dr. Ernest Weis, Vice-President and Medical Director for Chicago, decided that although Bekker could have been discharged he would continue her employment if she agreed to certain terms. Those terms were set forth in a December 6, 1996 letter and a Work Agreement and included the following: (1) submitting to a clinical evaluation, (2) attending any prescribed formal recovery program, (3) random testing by Employee Health Services for a two year period, (4) submitting all test results and treatment plans to Employee Health Services and (5) agreeing to advise any future employer of her condition if Bekker resigned during any treatment. Additionally, the letter and Work Agreement provided that any failure to comply with these terms could result in her discharge (Pet. App. 5a).

On December 6, 1996, Weis gave the letter and Work Agreement to Bekker and told her that he believed she had a drinking problem which required treatment. Bekker again denied drinking. Bekker declined to sign the Work Agreement, stating that she wanted to review it with legal counsel, but agreed to submit to an evaluation (Pet. App. 5a-6a).

Bekker was seen by Feldman on December 9, 1996. Feldman recommended that she check herself into a residential treatment program, which she declined to do. Feldman informed Dusek by telephone that he had made that recommendation to Bekker (Pet. App. 6a). Feldman subsequently sent a letter to Dusek on December 16, 1996 in which he wrōte that he believed that Bekker "meets criteria for alcohol abuse." He further wrote:

> [H]er health is clearly at risk, and she is currently sustaining severe professional consequences as a result of her drinking. Our recommendation at this point would be for Dr. Bekker to refrain from the practice of medicine and immediately enter a residential treatment program which has expertise in the care of chemically dependent healthcare professionals . . . . I feel it extremely important, both for Dr. Bekker and in the interest of patient care that she not return to the practice of medicine until she has completed treatment in a professional's program.

(Pet. App. 7a, 29a-30a)

On December 12, 1996, Weis sent a letter to Bekker informing her that if she did not accept the conditions by December 16, 1996 at 9:00 a.m., Humana would terminate her employment. Bekker did not agree and on December 17, 1996 Weis terminated Bekker's employment (Pet. App. 6a-7a).

B. The decision below

Bekker sued alleging that Humana discharged her because it perceived her to have a disability, alcoholism, in violation of the Americans with Disabilities Act, 42 U.S.C. § 12101, *et seq.* ("ADA") (Pet. App. 2a). Following discovery, the District Court granted Humana's motion for summary judgment. The District Court noted that the ADA protects only qualified individuals with disabilities and provides that an employer may have as a qualification that an employee not "pose a direct threat to the health and safety of others in the work place." 42 U.S.C. § 12113(b). The District Court held that Bekker bore the burden of proving that she could safely perform her job without endangering the health and safety of others (Pet. App. 40a). Applying the criteria set forth the EEOC's Interpretive Guidance, 29 C.F.R. § 1630.2(r), the Court held that the evidence showed that she was "reasonably likely" to be a threat to her patients and that she had not produced any evidence that she was not and so was not a qualified disabled individual under the ADA (Pet. App. 40a-42a). The District Court further held that, even assuming Bekker had shown that she was a qualified individual with a disability, her claim still failed because there was no evidence that Humana was not sincere in its belief, based on reports by Bekker's patients and co-workers, that she had smelled of alcohol while on duty and was a threat to her patients and that there was no evidence that Humana would not have discharged a non-alcoholic employee in the same circumstances (Pet. App. 46a-48a).

The Seventh Circuit affirmed the District Court, stating that it had "no disagreement" with the District Court's analysis of the direct threat issue. The Seventh Circuit further

held: "Nevertheless, even assuming that Dr. Bekker is a qualified individual with a disability, Humana was justified in discharging her" (Pet. App. 13a). The Court concluded that Bekker had no direct evidence of discrimination, that Humana had ample evidence that Bekker was seeing patients under the influence of alcohol and that Humana would have discharged her for that reason regardless of whether it perceived her to suffer from alcoholism (Pet. App. 16a-17a). The Court also held that Bekker's claims failed under the burden shifting analysis of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), because, even assuming Bekker had made out a prima facie case, Humana had stated a legitimate nondiscriminatory reason for discharging her — its belief that she was seeing patients while under the influence of alcohol — and Bekker had not presented any evidence that reason was pretextual (Pet. App. 17a-18a).

REASONS FOR DENYING THE WRIT

A. The decision below rests on a separate independent ground not challenged by Bekker

Both of the reasons advanced by Bekker for granting the writ dispute the determination below that she was a direct threat to her patients and so not a qualified individual under the ADA. Bekker first argues that the determination that she bore the burden of proof conflicts with other appellate court decisions and other authority (Pet. 7-9). Bekker secondly contends that she could not be determined to be a direct threat without competent medical evidence and challenges the competency of the evidence to support that determination (Pet. 10-12).

As set out above, however, the Seventh Circuit, in addition to ruling against Bekker on the issue of direct threat, assumed that Bekker had succeeded in showing that she was not a direct threat and thus had shown herself to be a qualified individual with a disability under the ADA. The Court then held that Bekker's ADA perceived disability claim failed for a separate independent reason — Humana discharged her because it reasonably believed that she had been seeing patients while under the influence of alcohol and would have done so regardless of whether it perceived her to have a disability. Bekker ignores this holding of the Seventh Circuit and does not challenge it as being erroneous or urge its review by this Court.

This case thus does not present an issue appropriate for review by this Court. Even were it held that Bekker was not a direct threat and so was a qualified individual under the ADA, her discharge would still stand because of the unchallenged holding that she had not shown unlawful discrimination. So far from having potentially broad application, this Court's resolution in Bekker's favor of the issues urged by her would not even affect the outcome in her case since her discharge would still stand.

B. The decision below does not conflict with the decisions of other Courts of Appeals

Contrary to what Bekker asserts, there is no conflict in Circuits about whether the plaintiff or the defendant in an ADA case bears the burden of proof on the question of direct threat. Like the Seventh Circuit in this case, the other Courts of Appeals which have considered the issue have all held that it is the plaintiff's burden to prove that she is a not direct threat.

In *EEOC v. Amego, Inc.*, 110 F.3d 135, 144 (1997), the First Circuit held that where the safety of others is necessarily implicated by essential job functions, the plaintiff must demonstrate that she can perform those functions in a way that does not endanger others.[1] Likewise, in *Moses v. American Nonwovens, Inc.*, 97 F.3d 446, 447 (1996), the Eleventh Circuit held that "[t]he employee retains at all times the burden of persuading the jury . . . that he was not a direct threat."

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1. By taking language out of context and combining phrases which appear three paragraphs apart, Bekker seeks to create the misimpression that *Amego* holds the exact opposite. What the First Circuit actually wrote, with the language used by Bekker set off by brackets, was:

> The EEOC stakes out a position which is far-too broad. This is not a case [where a person who can perform all essential job functions nonetheless poses a risk to others]. The district court did not, we believe, commit error in considering risk posed to others under the category of "qualification," where the risk is expressly associated with performance of an essential job function.

Three paragraphs later the Court wrote:

> We hold that, in a Title I ADA case, it is the plaintiff's burden to show that he or she can perform the essential functions of the job, and is therefore "qualified." Where those essential job functions necessarily implicate the safety of others, plaintiff must demonstrate that she can perform those functions in a way that does not endanger others. There may be other cases under Title I where [the issue of direct threat is not tied to the issue of essential job functions but is purely a matter of defense, on which the defendant would bear the burden].

Bekker's reliance on the Fifth Circuit's decisions in *Rizzo v. Children's World Learning Centers, Inc.*, 84 F.3d 758 (5th Cir. 1996) (*Rizzo I*) and *Rizzo v. Children's World Learning Centers*, 173 F.3d 254 (1999), is inappropriate; for in a later decision, *Rizzo III*, not cited to the court by Bekker in her petition, the Fifth Circuit sitting en banc held that it was not necessary to address the direct threat burden of proof issue since it had been raised for the first time on appeal and so did not do so. *Rizzo v. Children's World Learning Centers, Inc.*, 213 F.3d 209, 213, *cert. denied*, 121 S. Ct. 382 (2000). Moreover, Bekker's claim that the earlier *Rizzo* decisions placed the burden of proof on the employer is wrong. In *Rizzo II*, the Fifth Circuit applying its prior decision in *Rizzo I*, expressly agreed with the Eleventh Circuit's decision in *Moses*. The Fifth Circuit held "the burden of proof is on the plaintiff to prove that, as a qualified individual, she is not a direct threat to herself or others" and explained that because the "qualification standard" imposed by 42 U.S.C. § 12113(b) "obviously goes to the issue of whether plaintiff is a 'qualified individual with a disability,' the burden of proof would apparently fall on the plaintiff." 173 F.3d at 258-59. *Rizzo II* recognized a limited exception that would shift the burden of proving direct threat to the employer only "when a court finds that the safety requirements imposed tend to screen out the disabled." 173 F.3d at 259-60. But contrary to what Bekker represents, *Rizzo II* makes that a qualifier to the general rule and not the rule itself. It is also a qualification not even arguably applicable here since a policy prohibiting employees from being under the influence of alcohol, or appearing to be, while on duty applies equally to social drinkers and alcoholics.

Finally, contrary to Bekker's suggestion that *Den Hartog v. Wasatch Academy*, 129 F.3d 1076, 1088 (1997), holds direct threat to be an affirmative defense to be proved by the employer (Pet. 9), the Tenth Circuit did not there consider the issue of

allocation of burden of proof at all. The court concluded, without discussing burden of proof, that the evidence established the existence of a direct threat and required summary judgment for the employer.

As for Bekker's contention that the decision below conflicts with the ADA itself, as shown, the Circuits are in agreement that it does not. Further, even if the EEOC Interpretive Guidance, on which also Bekker relies, might be read to support a contrary conclusion, it "does not carry the force of law and is not entitled to any special deference." *Sutton v. United Airlines, Inc.*, 130 F.3d 893, 899 (10th Cir. 1997), *aff'd*, 527 U.S. 471 (1999). And, as the Fifth Circuit pointed out in *Rizzo II*, the Guidance supports imposing the burden on the plaintiff in the ordinary case, with the limited exception (not applicable here) for cases where a safety requirement tends to screen out the disabled.

There is no conflict in the Circuits or with any other authority which would make consideration of this case by this Court appropriate.

C. The decision below does not conflict with decisions of this Court

Both the District Court and the Court of Appeals held that ample objective evidence supported the determination that Bekker was a direct threat — patient complaints that she smelled of alcohol in 1990, 1995 and 1996; employee reports that they regularly smelled alcohol on her, at least once a week or more, and that employees and patients had commented on it; and employee reports that when the odor was present, her face appeared flushed and her eyes were dilated. Contrary to Bekker's arguments, this Court's

decisions in *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987), and in *Bragdon v. Abbott*, 524 U.S. 624 (1998), do not hold that an employer may not rely on such objective evidence or hold that an employer must have medical evidence to support its conclusion that an employee is a direct threat.

In *Arline*, this Court held that in determining whether an employee was a direct threat, "courts normally should defer to the reasonable medical judgments of public health officials." 480 U.S. at 288. Pointedly, this Court did not hold, as Bekker incorrectly asserts, that the determination of whether an employee poses a "direct threat" should be "based on" such medical judgments (Pet. 10). In *Bragdon*, this Court held that in assessing an employee's present ability to safely perform the essential functions of the job, the employer may rely upon a reasonable medical judgment in light of the available medical evidence or other objective evidence. 524 U.S. at 650-51. The Court rejected the contention that the judgment of the defendant in that case, a dentist, was entitled to deference and acknowledged that employers might consult with and rely upon "physicians as objective third-party experts." 524 U.S. at 650. That is exactly what Humana did here. Neither *Arline* nor *Bragdon* hold that an employer is required to have medical opinions to support its direct threat determination where there is other objective evidence.

The decision below that objective evidence supported Humana's determination that Bekker was a direct threat to the safety of her patients is in accord with the decisions of other Courts of Appeals. *Den Hartog v. Wasatch Academy*, *supra*, 129 F.3d at 1090 (determination that individual with bipolar affective disorder was direct threat based on repeated

threats and demonstrated propensity to carry them out was "eminently reasonable"; no medical examination conducted). Also, EEOC's Interpretive Guidance expressly states that an employer is free to rely on objective evidence or reasonable medical judgment. 29 C.F.R. § 1630.2(r).

Bekker's reliance on *Miners v. Cargill Communications, Inc.*, 113 F.3d 820 (8th Cir. 1997), *cert. denied*, 118 S. Ct. 441 (1997), is entirely misplaced. There, the employer terminated an employee for refusing to enter a treatment program after she had been observed drinking alcohol prior to driving a company van. The Eighth Circuit rejected the employer's argument that its offer of treatment was a reasonable accommodation under the ADA, stating: "Had Cargill acted on its perception that Miners suffered from alcoholism by attempting to establish that she was an alcoholic and demonstrated performance problems related to her alcoholism, it might have been able to avail itself of the opportunity to accommodate Miner's disability." *Id.* at 825. Thus, *Cargill* holds only that the employer could not require the employee to undergo treatment prior to any assessment that such treatment was warranted. In contrast, Humana did not require Bekker to have an evaluation and agree to the recommended course of treatment immediately after a single report, but after a series of patient complaints, an investigation that produced numerous reports indicating possible alcohol abuse and receiving the report of an expert in the field, Feldman.

It scarcely needs stating that a doctor who is impaired by alcohol is a danger to patients and that Humana did not have to wait for Bekker to actually harm a patient before acting. *Watson v. City of Miami Beach*, 177 F.3d 932, 935 (11th Cir. 1999) (ADA does not require police department

to forego fitness for duty examination and wait until a perceived threat becomes real or questionable behavior results in injuries); *Palmer v. Circuit Court of Cook County, Illinois*, 117 F.3d 351, 352 (7th Cir. 1997) (requiring employer to retain a potentially violent employee would "place the employer on a razor's edge — in jeopardy of violating the [ADA] if it fired such an employee, yet in jeopardy of being deemed negligent if it retained him and he hurt someone."); *Altman v. New York City Health and Hospitals Corp.*, 903 F. Supp. 503 (S.D. N.Y. 1995), *aff'd*, 100 F.3d 1054 (2d Cir. 1996), (upholding hospital's refusal to reinstate a physician to the position of Chief of its Department of Internal Medicine even after he had completed an in-patient alcoholism treatment program and was in a recovery program because of the harm he might cause if, either during or immediately after a period of heavy drinking, he made a command decision as to the proper course of treatment of a patient by other staff members).

Here, Humana responded appropriately to the compelling objective evidence that Bekker was seeing patients while under the influence of alcohol and required that Bekker undergo an evaluation and agree to whatever treatment might be recommended. Humana's actions were fully consistent with the decisions of this Court and entirely consonant with its obligations to its patients and under the ADA. *Senate Sergeant at Arms v. Senate Fair Employment Practices*, 95 F.3d 1102, 1107 (Fed. Cir. 1996) ("[P]rovision of a 'firm choice' between treatment and discipline is consistent with the statutory requirement of a reasonable accommodation of an individual with a disability. Treatment would seem to be essential to any accommodation for alcoholism. If an individual refuses treatment when offered, then discipline is appropriate."); *Williams v. Houston Lighting & Power Co.*,

980 F. Supp. 879, 883-84 (S.D. Tex. 1997) (holding that employer did not discriminate when it terminated nuclear power plant employee for refusing to sign agreement to submit to substance abuse monitoring program before returning to work).

No important issue is presented by Humana's actions which is appropriate for resolution by this Court. Indeed, Bekker's position would require employers to ignore objective evidence that an employee is a direct threat pending receipt of medical evidence and would invite protracted dispute and litigation over the adequacy of medical evidence obtained — all with potentially dire consequences to the employer, co-workers, customers and the public.

CONCLUSION

For all of these reasons, Respondent respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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